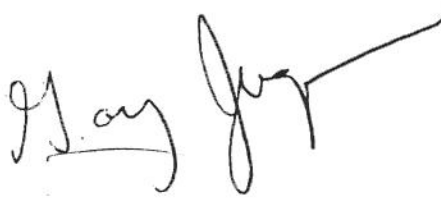


330.5019

To : Mr. Glenn Bystrom  
From : Gary Jugum  
Subject : Non-Attorney Opinions



May 20, 1996  
and 10/29/90

I have reviewed your memorandum of October 29, 1990 to .

We are in agreement with his conclusion, as follows:

**Sale and Leaseback** A company proposed that the Board adopt a "California Acquisition Sale/Leaseback Certificate," explaining that such a certificate would facilitate compliance with the acquisition sales and leaseback exclusion enacted by AB382. (See Section 6010.65 of R&T Code).

AB382 provides that the terms "sale" and "purchase" for purposes of sales and use taxes, shall not include any transfer of title to , nor any lease of, tangible personal property pursuant to an acquisition sale and leaseback where both of the following conditions are met.

1. The seller/lessee has paid sales tax reimbursement or use tax reimbursement or use tax with respect to that person's purchase of the property.
2. The acquisition sale and leaseback is consummated within 90 days of the seller/lessee's first functional use of the property.

This bill provides an exemption from sales and use taxes for sale and leaseback transactions only if the above conditions are met. <sup>Section 6010.65</sup> The statute does not provide that an exemption certificate obtained from a seller/lessee attesting that the conditions are met will relieve a purchaser/lessor from possible liabilities if it is found that the conditions were not met. In the event that the above conditions are not met, no exemption exists and the application of tax is governed by Regulation 1660. A sale/leaseback transaction which does not meet the conditions specified in AB382 is not exempt from tax. The lessor, in such a transaction, is liable for any taxes due measured by rental receipts unless he/she purchased the property tax-paid or reported tax timely measured by the purchase price. It is immaterial whether he/she holds an exemption certificate issued by the seller/lessee.

Therefore, the adoption of such a certificate is not <sup>appropriate</sup> advisable since it would have no real value. It would not provide proof that the conditions of AB382 have been met. Further, it would not relieve the holder of the certificate of possible liabilities if the certificate is not factual and could conceivably mislead a lessor into not collecting tax on a taxable lease. 10/29/90 ; 5/20/96

(916) 445-0387

October 29, 1990

State Board of Education

RECEIVED

Dear

Your letter dated August 28, 1990 to Mr. Gary Jugum, Assistant Chief Counsel, has been referred to me for reply since the subject concerns audit rather than legal matters.

In your letter, you proposed that the Board adopt a "California Acquisition Sale/Leaseback Certificate". You explained that such a certificate would facilitate compliance with the acquisition sale and leaseback exclusion enacted by AB 3382. You attached a proposed draft of such a certificate and asked that we review it and advise you of our feelings regarding this matter. You also asked that we advise you as to the compliance procedure most likely to be adopted by the Board.

AB 3382 provides that the terms "sale" and "purchase", for purposes of sales and use taxes, shall not include any transfer of title to, nor any lease of, tangible personal property pursuant to an acquisition sale and leaseback where both of the following conditions are met:

- (1) The seller/lessee has paid sales tax reimbursement or use tax with respect to that person's purchase of the property.
- (2) The acquisition sale and leaseback is consummated within 90 days of the seller/lessee's first functional use of the property.

As you can see, this bill provides an exemption from sales and use taxes for sale/leaseback transactions only if the above conditions are met. It is important to note that the statute does

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October 29, 1990

not provide that an exemption certificate obtained from a seller/lessee attesting that the conditions are met will relieve a purchaser/lessor from possible liabilities if it is found that the conditions were not met. In the event that the above conditions are not met, no exemption exists and the application of tax is governed by Sales and Use Tax Regulation 1660.

Regulation 1660 provides, generally, that any lease of tangible personal property for a consideration is a "sale" and a "purchase" with tax due measured by the rentals payable. An exemption is provided with respect to rentals charged for tangible personal property leased in substantially the same form as acquired by the lessor as to which the lessor has paid sales tax reimbursement or has paid use tax measured by the purchase price. If such tax has not been so paid, and the lessor desires to pay tax measured by the purchase price, it must be reported and paid timely with the return of the lessor for the period during which the property is first placed in rental service.

Accordingly, a sale/leaseback transaction which does not meet the conditions specified in AB 3382 is not exempt from tax. The lessor, in such a transaction, is liable for any taxes due measured by rental receipts unless he purchased the property tax-paid or reported tax timely measured by the purchase price. It is immaterial whether he holds an exemption certificate issued by the seller/lessee.

Therefore, the adoption of such a certificate is not advisable since it would have no real value. It would not provide proof that the conditions of AB 3382 have been met. Further, it would not relieve the holder of the certificate of possible liabilities if the certificate is not factual and could conceivably mislead a lessor into not collecting tax on a taxable lease.

The staff will follow routine audit procedures to verify exemptions claimed pursuant to AB 3382. The law provides that all sales/leases made in this state are presumed taxable unless specifically exempted by statute. In the case of a lease, it is the lessor's responsibility to provide proof of exemption for any transactions which are claimed to be exempt from the tax. In an audit of a lessor who claims an exemption under AB 3382, we would require that the lessor provide documentary evidence that the claimed exemption is valid. This could only consist of copies of the original invoices reflecting the sale by a manufacturer to the purchaser/lessee; proof that tax was paid by the purchaser/lessee, such as a cancelled check; and, evidence that the property was sold within 90 days of first functional use.

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October 29, 1990

I hope this information is helpful and I wish to thank you for your interest in the proper administration of the Sales and Use Tax Law. If I can be of any further assistance, please let me know.

Sincerely,

Glenn A. Bystrom  
Principal Tax Auditor

GAB:gjm  
0096A

!bc: Mr. Gary J. Jugum  
Mr. John Abbott  
District Principal Auditors

cc: All Libraries  
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Bystrom Book

State Board of Equalization  
Santa Cruz

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